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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

—v.—

PATSY T. MINK, *et al.*,
Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 180,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-two year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment to the Constitution. In the past several years, the ACLU has also represented citizens requesting disclosure of information from executive agencies of the government.

The right to know how the government is discharging its duties is essential to a people who would be their own

[1] Letters from each of the parties, consenting to the submission of this Brief, have been filed with the Clerk.

governors. It was to further the system of freedom of information established by the First Amendment that Congress passed the Freedom of Information Act. Amicus believes that this case poses important questions concerning the proper reach of the Act and involves issues critical to the continued existence of an informed citizenry.

Questions Presented

Does a United States District Court have authority under the Freedom of Information Act to review classified documents *in camera* to determine whether component parts of such documents were not separately classified as secret and therefore could not be withheld under the (b)(1) exemption to disclosure under that Act?

Does a District Court have authority under the Freedom of Information Act to conduct an *in camera* review to determine whether *factual* elements of memoranda containing policy discussions can be separated from the file and disclosed to the public under the Act?

ARGUMENT

Statement of the Case and Introduction

The respondents, 33 Members of Congress, commenced this action under the Freedom of Information Act, 5 U.S.C., section 552 (hereafter the "Act"), to compel petitioners to release certain documents pertaining to an underground nuclear test explosion scheduled to take place on Amchitka Island, Alaska. The nine documents sought were prepared in connection with a study of the proposed test by a committee under the chairmanship of the Undersecretary of State, John N. Irwin, II.

Petitioners resisted disclosure, claiming exemptions under subsections (b)(1) and (b)(5) of the Act. Solely on the basis of an affidavit submitted by petitioner Irwin, petitioners moved for summary judgment in the District Court. The affidavit asserted that eight of the nine documents "involve highly sensitive matter that is vital to our national defense and foreign policy" (Joint Appendix at 29 [hereinafter cited as Jt. App.]), and that all of the documents "were prepared solely for the purpose of giving advice to the President . . ." (Jt. App. at 29). No factual basis is given for this conclusion. On the other hand, the affidavit suggested that some of the documents in question were being withheld solely because of their physical attachment to other documents, and that none of the documents had been *specifically* classified secret by Executive order.[2] The

[2] The affidavit stated that the documents had been classified under Executive Order 10501, which establishes a *general* classification scheme for all executive agencies (Jt. App. at 27).

nature of the Irwin affidavit is underscored by the subsequent statement of petitioner Ruckelshaus, whose memorandum is one of the documents at issue, that "[t]here was nothing in my comments that needs to be stamped 'top secret'" (Jt. App. at 57).

The District Court granted petitioners' motion for summary judgment solely on the basis of the Irwin affidavit and without examining any of the documents in question. On respondents' expedited appeal, the Court of Appeals reversed and remanded the case to the District Court for further consideration, and petitioners obtained a writ of certiorari from this Court.

The issue on this appeal is narrow. It is whether the federal courts are to play any role in reviewing refusals of the Executive Department to disclose information pursuant to the Freedom of Information Act, or whether the mere incantation by administrative agencies of the statutory exceptions to disclosure, see 5 U.S.C. §552(b), will foreclose judicial scrutiny of such refusals.

The language and the legislative history of the Act indicate that judicial review is an elemental part of the statutory scheme. Thus, the Act states:

> On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. 5 U.S.C. §552 (a)(3).

The House Report accompanying the bill elaborated:

> [The bill] contains a specific remedy for any improper withholding of agency records by granting the United States district courts jurisdiction to order the production of agency records improperly withheld . . .
>
> The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The Court will have authority . . . to enjoin the agency from withholding its records and to order the production of agency records improperly withheld.[3]

The Congress felt that meaningful judicial review was so important to the success of the proposed statute that it further provided that, with certain exceptions:

> [P]roceedings before the district court as authorized by this paragraph shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. 5 U.S.C. §552 (a)(3).

If these procedural guarantees of judicial review are to be more than formalities, a district court must be permitted to look beyond the mere assertion of a statutory exemption by an administrative agency. The court must determine as a matter of law whether the claimed exemption was properly invoked. This is all that the Court of Appeals directed

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[3] H.R. Rep. No. 1497, 89th Cong. 2d Sess. 9 (1966). See also, S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965). The House Report also made it clear that the burden of proof is on the agency as "the only party able to justify the withholding." *Id.*

in this case. Moreover, that court was careful not to impinge unduly on the Executive's authority over foreign policy and defense. Amicus submits that anything less than the review called for by the decision below would emasculate the disclosure requirements of the Act.

Contrary to the representations in the Government's brief at 21, the opinion of the Court of Appeals does *not* call for an independent judicial evaluation of the propriety of withholding specific information for reasons of national defense or security. With reference to subsection b(1) of section 552—the foreign affairs and security exemption—the Court of Appeals made only two narrow holdings, and it reserved decision on a third question pending a more thorough treatment on remand and possible subsequent appeal.

First, the Court of Appeals directed the District Court to:

> . . . take evidence on whether, and to what extent, the file contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption of subdivision (b)(1) solely by virtue of their association with separately classified documents. Appendix to Petition for Writ of Certiorari at 27 [hereafter cited as App.].

The District Court was not asked to determine itself whether documents in the file should have been classified, but only to determine which documents *the Executive* had concluded did not warrant secrecy classifications. The Government does not challenge this aspect of the opinion below. See Brief for Petitioners, footnotes 5, 7 and 12, pages 6, 8 and 17.

Second, the Court of Appeals required the District Court to review the file to determine whether or not component parts of the classified documents bear the same secrecy classification as the unified document. If not, and if "the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." App. at 27. Again, the District Court is not asked to substitute its judgment for that of the Executive, but is merely directed to determine whether the Executive found that certain information did not require a secrecy classification.

Finally, the Court of Appeals declined to decide either whether classification of documents pursuant to Executive Order 10501 was sufficient to meet the requirements of subsection (b)(1) of the Act, or whether a separate executive order is required for each document or group of documents withheld under the (b)(1) exemption. The court concluded that:

> [S]ummary disposition of this issue by this court is inappropriate, and should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand. App. at 24.

Thus, the only issue which this Court must decide now as to the (b)(1) exemption is whether the District Court has authority to review the file to determine whether component parts of documents have not been separately classified by the Government as secret and therefore must be released.

We urge this Court to affirm the holding below. This would permit the lower courts to consider the issues not

reached by the Court of Appeals, if appropriate after full presentation on remand. If this Court should decide to hear the reserved questions, amicus urges that the classification procedures of the Executive be disapproved, as indicated below in Sections 1B and 1C of this brief.

I.

The Court below was correct in directing the District Court to review the documents *in camera* to determine whether component parts of such documents were not classified and therefore could not be withheld under the (b)(1) exemption of the Freedom of Information Act.

A. *Separable unclassified components of classified documents must be released under the Act.*

Executive Order 10501, the document relied upon by the Government as authority for its classification actions, plainly contemplates that component parts of documents may bear different classifications from the document as a whole. Executive Order 10501, Section 3(c), 3 C.F.R. 292 (Jan. 1, 1971). As Deputy Assistant Secretary of Defense Cooke stated in testimony before the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations 92nd Cong., 1st Sess. (1971) [hereafter, Moorhead Hearings]:

> Most documents containing classified information include information which is not classified as well as other information which is classified at different levels of classification . . . Individual portions of a document should be marked to show the classifications applicable to information contained therein. Moorhead Hearings, pt. 2, at 393 (June 29, 1971).

The Executive Order does not prohibit the release of such component parts that have been separated from the whole. The Order merely requires that the *unified* document be classified at least as high as that of its highest classified component, and that it bear only one classification. Executive Order 10501, 3 C.F.R. 292 (Jan. 1, 1971), Section 3(c). This, of course, is logical. When it is treated as part of a unified document, a classified component must impose its level of classification on the entire document because disclosure of the unified document would reveal the classified component. But this in no way suggests that the unclassified components of that unified document cannot be released *separately* if the public interest, as expressed by Congress, so demands.[4]

The passage of the Freedom of Information Act subsequent to the original proclamation of Executive Order 10501 is just such a congressional expression, and requires that, where practicable, such information be released. The Act was based on the philosophy that an informed public is essential to the proper functioning of a representative democracy. As then-President Johnson said upon signing the new law:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits . . . 2 Weekly Compilation of Presidential Documents 895, July 11, 1966.

The Reports of the House and Senate Committees that considered the Act reflected similar viewpoints. The House

[4] Indeed, the Order specifically states that "pages, paragraphs, sections, or components" of a document may bear different classifications from the document as a whole. *Id.* §3(c).

Committee on Government Operations concluded, for example, that:

> A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a truism needs repeating... House Report No. 1497, *supra* at 12. See also Senate Report No. 813, *supra* at 3.

This principle is reflected in the First Amendment, which protects not only the right of citizens to speak and publish, but also the right of the public to receive and hear such speech and information. See *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan & Goldberg, JJ., concurring); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964); see generally *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). Thus, the Act must be seen as an affirmative effort on the part of Congress to give meaningful content to the system of freedom of expression as provided by the First Amendment. See Emerson, *The System of Freedom of Expression* (1971), Chapter XVII.

Congress and the President were, of course, cognizant of the competing security interests of defense and foreign policy. It was to accommodate these interests that subsection (b)(1) was included in the Act. Yet Congress clearly indicated that protection of such security interests should not be read to require that the public interest in disclosure "either be abrogated or substantially subordinated." Senate Report No. 813, *supra* at 3. Rather,

> [s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, *yet places emphasis on the fullest responsible disclosure.* *Id.* (emphasis added).

Amicus submits that the opinion below provides such a "workable formula". It protects those components of documents that the Executive has found require secrecy, while permitting the maximum possible disclosure of information which the Executive itself has determined need not be *independently* protected. Indeed, the Executive's sole rationale for withholding the documents at issue in this case is to maintain the secrecy of *other* documents whose disclosure is not sought by the respondents. This rationale is unnecessarily broad to protect the legitimate interests of national security.

This Court previously has dealt with similar situations in which the interest in national security was pitted against First Amendment values. In *Lamont* v. *Postmaster General*, 381 U.S. at 302, the Court struck down a statute providing that foreign-based mail determined by the Secretary of the Treasurer to be " 'communist political propaganda,' shall be detained by the Postmaster General . . . and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request." It was held that the statute was invalid, despite the claim of national security, because it created an undue deterrent effect on the First Amendment right to receive foreign mail.[5]

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[5] Similarly, in *United States* v. *Robel*, 389 U.S. 258 (1967), the Court held that the government could not forbid a Communist from working in a non-sensitive position in a defense plant. While the

With the passage of the Freedom of Information Act, Congress acted consistently with this line of cases interpreting the First Amendment in a national security setting. Its "workable formula" seeks to place the least restrictive alternative upon the exercise of freedom of expression. The formula was necessary to protect against abuses of over-classification in violation of the will of Congress. The holding below is essential to realize this legislative purpose, for if a court had no authority to review and order the release of unclassified components, an enormous loophole would be opened in the legislative and constitutional mandate.

B. ***The Executive can withhold a document or group of documents under the b(1) exemption of the Act only by issuing an order directing that that specific document or group of documents be kept secret.***

Amicus re-emphasizes that the issues dealt with in this and the succeeding subsection of the Brief are not properly before the Court at this time, and are not necessary to its decision. The arguments are put forward in the event that the Court exercises its discretion to decide them at this time.

Petitioners claim that classification of a document pursuant to Executive Order 10501 automatically protects it from disclosure under the b(1) exemption of the Act, and that a specific executive order concerning each document or groups of documents is not required. But the language

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Court recognized the legitimate concern with the national security, it found that "Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." 389 U.S. at 268. Cf. *United States* v. *Brown*, 381 U.S. 437 (1965).

and general purpose of the Act to eliminate excessive Executive secrecy, and the actual practice of over-classification under Executive Order 10501, precludes such an interpretation.

Subsection b(1) of the Act exempts from disclosure matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The language of the statute demonstrates that Congress desired the Executive to consider each matter that might require secrecy, and to issue an order to that effect if a decision to refuse a request for disclosure under the Act is made.[6] A classification under Executive Order 10501 does not meet that test.

The congressional purpose underscores the express requirement of the statute. It reflects the distrust of unbridled executive authority that motivated the founding fathers in forging the constitutional scheme. See Sen. Report No. 813, *supra,* at 2-3; House Report No. 1497, *supra,* at 8.

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[6] The Act does not require that the President make every classification decision in the Executive Department. A general executive order in which the chain of authority to classify is clearly specified and severely limited and in which the standards of classification are plainly and narrowly defined would suffice for the day-to-day classification decisions. It is only when a specific request for disclosure under the Act is made that a Presidential order is required to continue to withhold the matter sought. This requirement does not place an undue burden upon the Office of the President, as indicated by the fact that the President elsewhere is required to specifically certify the withholding of other information such as the use of special foreign assistance funds under 22 U.S.C. §2364. See, for example, 37 Fed. Reg. 12245 (June 21, 1972) where it was noted that the President had made a determination under §2364(a) and that "The President has concluded that publication of the said determination in the Federal Register would be harmful to the national security of the United States."

The Act recognizes the discretion of the Executive in the foreign policy and defense areas, but insofar as the consequence of this discretion is to withhold information from the public, it is tolerated out of necessity, and limited as far as possible. Such toleration is possible because of the qualities of the American Presidency that reduce—but do not eliminate—the dangers of arbitrary executive action. The President must stand for election every four years and he can be held accountable for his action. When he, or his publicly designated responsible high subordinate, states that a matter requires secrecy, a degree of deference must be given the decision.[7] However, when decisions to withhold information from the public are made by lesser officials with no electoral mandate, then public control over such impingements on First Amendment freedoms is considerably lessened. The identifiable and accountable figure of the President is replaced by anonymous middle-level bureaucrats responsible perhaps only to their immediate superiors and in fact often to no one at all. It was to remedy the problems associated with excessive administrative secrecy that the Act was passed. Both the Senate and House Reports found that the old provisions of the Administrative Procedure Act, intended to provide for disclosure of information, had been turned instead into a device for administrative withholding of such information:

> Under the present [pre-Freedom of Information Act] section 3 [of the Administrative Procedure Act], *any Government official* can under color of law withhold almost anything from any citizen under the vague

[7] Nevertheless, such decision is not free of judicial control. See *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953); *Epstein* v. *Resor*, 421 F.2d 930 (9th Cir. 1970); *infra*, part I(C).

> standards—or, more precisely, lack of standards—in section 3. It would require almost no effort for *any* official to think up a reason why a piece of information would be withheld . . . And even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available. Senate Report, *supra* at 5; House Report, *supra* at 10 (Emphasis added).

It is inconceivable that a Congress so strongly expressing its displeasure at past classification practices by anonymous administrative officials under vague, non-reviewable standards meant to perpetuate such practices in passing reform legislation. Congress emphasized that it was passing "not a withholding statute but a disclosure statute," and sought to avoid the use of "vague phrases" and to replace them with "specific and limited types of information that may be withheld." Senate Report, *supra* at 5; House Report, *supra* at 11.

The continued blanket reliance on Executive Order 10501 undercuts the congressional purpose by perpetuating the situation that Congress attempted to remedy. The definitions of the Order are hopelessly vague and have allowed the Executive Branch, almost at will, to place a shroud of secrecy over information.[8] Equally alarming as the

[8] Executive Order 10501 establishes three categories of classified information: TOP SECRET, SECRET, and CONFIDENTIAL. Each category is defined, but in terms so broad and unconfined that the bureaucrat who classifies the information is lodged with untrammelled discretion, and reviewing courts are provided with no standards by which that administrative discretion may be reviewed. Under the Executive Order, then, the bureaucrat is empowered to license public information, but without the "narrow, objective and

loose definitions is the failure of the Order to limit effectively the number and position of those authorized to classify under the Order.[9]

The large number of officials with authority to "originally" classify materials, described in footnote 9, is only the tip of the iceberg. The practice of "derivative classification" makes it nearly impossible to limit the number of officials with classification authority. In the Department of Defense alone, one witness before the Moorhead Subcommittee estimated that "hundreds of thousands" of people may issue derivative classification stamps. Moorhead Hearings, *supra*, pt. 1, p. 98 (Statement of William G. Florence, former Deputy Assistant Secretary for Security

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definite standards to guide the licensing authority . . . " that are required under the First Amendment. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968).

[9] Section 2(a) of the Order lists thirty-four departments and agencies whose heads have authority for original classification, and who may delegate that authority without limit. Section 2(b) lists twelve additional departments and agencies whose heads may classify, but who may not delegate such authority. Executive Order 10501, Section 2, 3 CFR 292 (1971). Those department heads with power to delegate classification authority have done so extensively. There are approximately 5100 government officials with original "TOP SECRET" classification authority, alone. See *New York Times*, March 9, 1972, p. 12, col. 5; *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1200 (1972).

According to the testimony of Deputy Assistant Secretary Cooke before the Moorhead Subcommittee, 31,048 people in the Department of Defense may exercise original classification authority, of whom 7687 may classify matters as "SECRET", and 803 may classify matters as "TOP SECRET". Moorhead Hearings, *supra*, pt. 2 at p. 599. The situation in the other departments is little better. Deputy Under Secretary of State William Macomber testified before the same subcommittee that about 6000 State Department officials have original classification authority. Moorhead Hearings, *supra*, pt. 3, at 918.

and Trade Affairs). See Department of Defense Instruction No. 5210.47, Section V(B). The Harvard Law Review recently described the practice as follows:

> A derivative classification must be applied to a document that makes use of classified information. Even if classified information is not used in the second document, a derivative classification may be applied if the individual responsible for the document determines that it is sufficiently related to the classified information to warrant classification . . . Since anyone with access to classified documents has authority to impose a derivative classification, the number of government employees who actually classify documents is huge. *Developments in the Law,* 85 Harv. L. Rev., *supra,* at 1200.

Suffice it to say, virtually unlimited original and derivative classification power has led to massive overclassification of documents.[10]

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[10] According to testimony before the Moorhead Subcommittee, there are over 20 million classified documents in the Department of Defense alone (Statement of Deputy Assistant Secretary David Cooke, *supra,* pt. 2, pp. 658-659), and over two million classified documents in the State Department. There was universal agreement among the expert witnesses at the hearings that the vast majority of such documents did not warrant secrecy classifications. For example, former United Nations Ambassador and Supreme Court Justice Arthur Goldberg stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time." *Id.,* pt. 1, p. 12. And former Pentagon security specialist William Florence believed that "less than one-half of 1 percent of the different documents which bear currently assigned classification markings actually contain information qualifying for even the lowest defense classification under Executive Order 10501." *Id.,* pt. 1, p. 97.

Petitioners reliance on references to Executive Order 10501 in the legislative history of the Act is erroneous and misleading.[11] The only reference either by the Senate or House Committee is in the House Report, where the Committee said:

> [C]itizens both in and out of Government can agree to restrictions on categories of information which *the President has determined must be kept secret* to protect the national defense or to advance foreign policy, *such as* matters classified pursuant to Executive Order 10501. H.Rep. No. 1497, *supra,* at 9-10 (emphasis added).

This passage indicates that the President must determine whether or not a matter is to be withheld from disclosure under the Act. The reference to the Executive Order is merely suggestive of the kinds of information that the President might order withheld. It does not say

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[11] Since the Court of Appeals issued its decision in this case, the President has issued a new Executive Order 11652, 37 Federal Register 5209 (March 10, 1972), to replace Executive Order 10501, effective June 1, 1972.

While the new Executive Order has no bearing on the issues in this case, see §5(d) it should be observed that it does nothing to remedy the proliferation of classification authority that existed under its predecessor, and, in fact, may make matters worse. The Order permits department heads to delegate full classification authority to their (unnamed and unnumbered) principal deputies and assistants, and the deputies and assistants of major elements of such Department. Moreover, anyone upon whom "TOP SECRET" classification authority has been conferred may, in turn, designate *any* of his subordinates to classify matters as "SECRET", and anyone with authority to classify as "TOP SECRET" or "SECRET" may designate *any* of *his* subordinates to classify matters as "CONFIDENTIAL". And the definitions of these categories are even broader and less confined than were the definitions under Executive Order 10501.

or imply that the order, of itself, is sufficient authority to refuse disclosure under the Act.[12]

In conclusion, the language and purpose of the Act indicate that once a specific request for disclosure of a matter is made under the Act, a refusal to release the requested material can be justified only when the President issues a *specific* order that the matter is privileged under the b(1) exemption.

C. *Federal courts have authority to review the merits of government secrecy classifications, at least to determine whether the Executive's classification privilege has been arbitrarily and capriciously asserted.*[13]

The government claims authority to classify national security material, free from *any* interference from the judicial or legislative branches. This alleged unbridled discretion is said to flow from the President's foreign affairs and national defense power, *United States* v. *Curtiss-Wright,* 299 U.S. 304 (1936), and is said to be recognized inherently in the Constitution and explicitly in section b(1) of the Act.

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[12] The comments of two Congressmen on the House floor are even less persuasive. First, the views of individual Congressmen have little probative value, compared to committee reports. The committees gave the bills intensive study and their reports represent the finely considered views of those Congressmen who together were responsible for drafting the legislation. Comments on the floor, however, are spontaneous, and represent the views only of the person stating them, and not the other 534 Senators and Representatives who may vote on the bill. See the concurring and dissenting opinions of Justices Jackson and Frankfurter in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951).

[13] Amicus again notes that this issue is not necessary for decision by the Court at this time. See pages 7 and 12, *supra.*

The Executive has the right to keep certain information secret in the national interest, but that is not the question here.

> The fundamental issue underlying the constitutional question whether particular information should be disclosed is who should decide what *classes* of information should not be disclosed and whether particular information is within one of the classes. *Developments in the Law,* 85 Harv. L. Rev. *supra* at 1219.

This issue involves more than the scope of the executive power to protect the national security. It implicates the public's right to receive information under the First Amendment, discussed above, and the constitutional scheme of separation of powers among the three branches of government.

The system of checks and balances was built into the Constitution to assure a government of laws, free from the arbitrary rule of executive authority. As Justice Brandeis stated in a now-famous dissent:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. *Myers* v. *United States,* 272 U.S. 52, 293 (1926). Quoted by Justice Frankfurter in *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 613-614 (1952) (concurring opinion).

The theory propounded by the government here goes far beyond allowing the executive department to operate freely within the bounds of its proper authority. Instead, it would remove the "friction" of congressional limitation and judicial review necessary to confine that authority within narrow limits. It encourages the executive branch to act behind a veil of secrecy, denying the people their right to know what their government is doing and to hold it accountable for its actions. It does this by ignoring the basic doctrine that questions of constitutional and statutory interpretation ultimately are to be resolved by an impartial judiciary.

This Court and other federal courts have not hesitated to uphold the essential role of the judiciary in reviewing executive actions, even under the war or foreign affairs power. In *Ex Parte Milligan*, 71 U.S. 2 (1866) the Court held that the President did not have the power in wartime to establish military tribunals to try civilians as long as the civilian courts still functioned. It rejected government claims that the executive's wartime actions were immune from judicial review. Similarly, in *Youngstown Sheet and Tube Co.* v. *Sawyer, supra,* the Court enjoined the Secretary of Commerce from seizing and operating the nation's steel mills in the face of a wartime strike in that industry.

Finally, this Court has recognized the role of the judiciary in reviewing Executive refusals to disclose secret information dealing with the national security. In *Reynolds* v. *United States,* 345 U.S. 1 (1953), a plaintiff under the Tort Claims Act sought discovery of an Air Force official accident investigation report. Although discovery ultimately was refused, the Court held that "[j]udi-

cial control over the evidence in a case cannot be abdicated to the caprice of executive officers," 345 U.S. at 9-10, and that the applicability of an executive privilege must be determined by the courts.

A similar finding was made by the Ninth Circuit in *Epstein* v. *Resor*, 421 F.2d 930, 933 (1970). The court held that the Freedom of Information Act authorized the district court "to determine whether classification was arbitrary or capricious." However, an *in camera* review of the file was not warranted in *Epstein* because of evidence that a careful paper-by-paper review of the file had been made; there is no such evidence before this Court in the case at bar. Moreover, the court in *Epstein* found that the agency was not "hiding material under a filing system that gives top-secret classification to material simply because it relates, for filing purposes, to other material that is truly top secret." 421 F.2d at 933. In the instant case, the Court of Appeals was not able to make such findings, and directed the District Court to examine the file to answer just those questions.

The scope of review actually provided in the *Epstein* case, while considerably broader than that claimed by the government, was still too narrow. Both the First Amendment and the Freedom of Information Act mandate judicial review of classification. The standard for review may well be "arbitrary and capricious." Cf. *Developments in the Law*, 85 Harv. L. Rev. at 1222-23 (Executive's assertion must be at least arguably proper). But there is no way to determine whether classifications are arbitrary or capricious without reviewing the content of those classifica-

tions. Thus in order for the judiciary to exert some meaningful control over executive tendencies toward oversecrecy, pursuant to the mandate of the Act, it must review documents *in camera* to determine whether the Executive's classification privilege has been arbitrarily and capriciously asserted. This must be done, at least for matters classified under a general order such as Executive Orders 10501 or 11652, where the authority to classify is wide and overclassification is rampant.

When a showing can be made that the President himself (or perhaps a high Executive official *personally* designated by him) actually reviewed the document or file and *specifically* issued an order that it not be released, then the judicial inquiry may be more limited, as in *Epstein* v. *Resor, supra.* But that is not the practice with the overwhelming majority of classified documents, and it was not done with the file at issue in the present litigation.

II.

The Circuit Court was correct in directing an *in camera* review to determine whether *factual* elements of memoranda containing policy discussions could be separated from the file and disclosed to the public under the Act.

The Court of Appeals directed the District Court on remand to examine the documents *in camera* to separate out "factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption." App. at 29. The court relied on its earlier decision in *Soucie* v. *David,* 448 F.2d 1067 (1971), to the effect that:

> while the exemption protects the decisional processes of the President, or other policymaking executive officials, it does not prevent the disclosure of *factual* information unless it is inextricably intertwined with policymaking processes. *Mink* v. *Environmental Protection Agency,* App. at 28 (emphasis added).

The holding below is required by the statute and the case law, and should be affirmed.

Initially, it should be recognized that there is no issue here of interference with executive discretion in sensitive defense and foreign policy areas. In particular, the subsection (b)(5) exemption does not involve questions of the Executive's discretion in these areas. In deciding (b)(5) questions, courts are directed to determine the issue "de novo," 5 U.S.C. 552 (a)(3), and they are not constricted by the deference to the President's authority that may operate with respect to subsection (b)(1).

In this context, the strong policy considerations in favor of maximum possible public disclosure are decisive. The Congress was cognizant of the First Amendment implications of an information statute, and acted to remove all but the minimal restraints to full disclosure. See *supra*, p. 10. The Fourth Circuit recently recognized this policy in strictly construing another of the exemptions to the law:

> After considering voluminous testimony on both sides and balancing the public, private, and administrative interests, Congress decided that the best course was open access to the governmental process with a very few exceptions. It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress has considered. *Wellford* v. *Harden*, 444 F.2d 21, 24-25 (1971).

Similarly, Congress has balanced the interests in favor of disclosure in the instant case, and has directed that the federal courts enforce its policy decisions against recalcitrant federal agencies.

A. *In applying the same standards that govern discovery practice under the Federal Rules of Civil Procedure to disclosure of information to the general public, the Act incorporates the distinction between disclosure of opinions and policy recommendations, on the one hand, and factual information, on the other.*

Subsection (b)(5) of the Act exempts from disclosure matters that are:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

The language of this provision admits of a single interpretation: if the matter could be discovered by a private party in litigation in federal court, it must be publicly disclosed under the Act. See *Sterling Drug, Inc.* v. *Federal Trade Commission,* 450 F.2d 698, 705 (D.C. Cir. 1971); *Soucie* v. *David, supra; General Services Administration* v. *Benson,* 415 F.2d 878, 880 (9th Cir. 1969); *Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796, 804 (S.D.N.Y. 1969).

In *Consumers Union, supra,* the court stated:

> To determine if the requirements of the fifth exemption are met, this court must ask if the records sought . . . would not be available to any party in any litigation in which the agency having the records might now be involved. The fulcrum of this test is discovery practices as regulated by the courts, not discovery as it is practiced by the government . . . *Id.* at 804.

The Ninth Circuit agreed that "the standards for decision are the discovery practices, as regulated by the courts." *General Services Administration* v. *Benson,* 415 F.2d at 880.

The distinction between discovery of factual information and discovery of advisory policy opinions and recommendations has been widely recognized by federal courts. Thus, discovery was denied in *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd* 384 F.2d 979 (D.C. Cir. 1967), on the grounds that the documents sought consisted *"wholly* of opinions, recommendations and deliberations relating to legal and other determinations." 40 F.R.D. at 327 (emphasis added). The court noted that "There is an obvious distinction, in terms

of necessity for inspection, between documents of this character and those which contain facts." The court rested its refusal to review *in camera* the documents in that case on the fact that such review could serve no useful purpose:

> Here inspection can satisfy no need for separation, for there appears nothing to separate; nor any need for balancing, with apparently nothing here to be weighed. *Id.* at 332.

In another case, the Ninth Circuit required disclosure under the Freedom of Information Act by applying the usual discovery standards of Rule 26(b), Fed. R. Civ. P., stating that discovery would be called for "especially insofar as . . . [the records at issue] are factual material rather than documents which comprise the administrative reasoning process of government." *General Services Administration* v. *Benson,* 415 F.2d at 880. Accord, *Reliable Transfer Co.* v. *United States,* 53 F.R.D. 24 (E.D.N.Y. 1971) ("The facts found by an investigating officer should be made available to the adversary under general principles of discovery"); *Sterling Drug Inc.* v. *Federal Trade Commission, supra; Consumers Union* v. *Veterans Admin.,* 301 F. Supp. at 805 ("To decide whether the records sought here are within the fifth exemption, this court must determine whether they were part of the deliberate process of the agency or were factual in substance"); *Soucie* v. *David, supra;* 4 Moore's Federal Practice ¶26.61[7], at 26-331 (2d ed. 1971).

Thus, the opinion below requiring the District Court to review the documents to disclose "factual information unless it is inextricably intertwined with policy making processes" is supported by other federal courts throughout the country.

Petitioners seek to invoke the language of the House Report regarding exemption b(5) to the effect that disclosure should be allowed only if discovery would be "routinely" permitted. See H.R. Rep. No. 1497, *supra*, at 10. To the extent that the language of the House Report at all qualifies the language of the statute, it supports the distinction between the disclosure of policy and disclosure of facts. The very case that petitioners rely upon in making their argument—*Sterling Drug Inc.* v. *Federal Trade Commission, supra*—noted that while discovery of memoranda containing legal analyses and recommendation was not routine, discovery of factual information contained within such memoranda was permitted. 450 F.2d at 704. Thus, the court below properly ordered *in camera* review of the documents to determine whether parts of the documents, with policy opinions deleted, should be disclosed. 450 F.2d at 704, 708.

B. *The Congressional history supports the conclusion of the Court below.*

Petitioners maintain that the change in the language of subsection b(5) from the original version in the earlier Senate and House bills constituted a change of substance by which Congress authorized the withholding of factual information as well as matters of law and policy. This argument is demonstrably not valid.

In 1964, the Senate Judiciary Committee of the 88th Congress reported out a bill exempting from disclosure "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy."

The Senate Report accompanying the bill stated that all factual material was to be made available to the public,

but that some degree of secrecy was required *vis-à-vis* legal or policy matters.

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency [of] Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to "operate in a fishbowl." The Committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. S. Rep. No. 1219, 88th Congress, 2d Session 6-7 (1964).[14]

When the proposed statute failed to clear the 88th Congress, it was re-introduced in the 89th Congress the next year. The Committee hearings revealed a fear that the narrow internal memorandum exemption might be read even more narrowly than Congress had intended. The fear stemmed from the language of the section, which seemed to apply the exemption from disclosure only to documents "dealing *solely* with matters of law and policy" (emphasis added), implying that documents consisting partly of factual information and partly of matters of law and policy would have to be revealed *in their entirety*. The

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[14] This paragraph was repeated in the Senate Report accompanying the final version of the bill that was enacted. S. Rep. No. 813, *supra* at p. 9. It was quoted in the Brief for Petitioners, p. 36, in an attempt to create the impression that the new language was intended to create a substantive change in the bill. On the contrary, the retention of the same explanatory paragraph implies no substantive change was intended in the scope of the proposed statute.

point was made that all policy discussions contained some factual references, and that if those references automatically made the policy discussions open to disclosure, the effect would be to stifle open and frank consideration of policy alternatives.[15] Since Congress did not intend such a result, the imprecise language was amended to protect policy discussions even when joined with factual material.

But Congress did *not* provide for the exemption of entirely factual matters. It merely applied the typical pretrial discovery standard by which policy matters are often excluded from factual discovery. See Section IIA, *supra*. As the District Court explained in *Consumers Union, supra*:

> The substituted language, being more precise, seems to be a refinement of the policy versus fact distinction so that the distinction can still be used within the discovery test now explicitly laid down by the statute. It is at least clear, in light of the strong Congressional drive to promote disclosure that the amendment was not intended to place "factual material" within the coverage of the fifth exemption. 301 F. Supp. at 805.

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[15] Thus, the statements at the hearings quoted by Petitioners in footnotes 17 and 19 of their Brief were directed at the probable consequences of having to reveal the law and policy portions of mixed fact-policy memorandums, and not at the consequences of revealing only the factual portions thereof. Thus, for example, the Department of Commerce requested that the "subsection . . . be amended to exempt also *such portions* of inter-agency or intra-agency memorandums or letters *as deal with matters of law or policy*." 1965 Senate Hearings, pp. 406-407 (emphasis added). This is precisely what Congress intended, and the new language was substituted to clarify that point.

CONCLUSION

Congress manifested its intention to accomplish two purposes through the Freedom of Information Act: first, to increase greatly the public's access to information that had previously been kept secret by administrative fiat, and second, to enable citizens aggrieved by agency refusals to disclose information to obtain a hearing *de novo* in a federal court, with the burden on the agency to sustain its action.

The opinion of the Court of Appeals in the instant case is thoroughly consistent with these congressional purposes. The position urged by the Government, on the other hand, would undermine the carefully constructed congressional scheme, reducing judicial review to a mere formality by which the Government need only restate in court its administrative decision to withhold the matters sought. The decision of the court below, should be affirmed.

Respectfully, submitted,

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